No. 9668

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, deceased,

Appellee,

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Appellant's Reply Brief

Howard Toole
W. T. Boone
Attorneys for Appellant

Upon Appeal from the District Court of the United States for the District of Montana.

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INDEX

Page

Supplemental Transcript on Appeal 1

Ambiguity 3

CITATIONS

Commercial Standard Ins. Co. vs. McKinney
114 S. W. (2d) 338 6

John Alt Furniture Co. vs. Maryland
Casualty Co., 88 Fed. (2d) 36 8

Leaksville Light & Power Co. vs. Georgia
Casualty Co., 125 S. E. 123 5

Maryland Casualty Co. vs. Texas Fireproof
Storage Co., 69 S. W. (2d) 826 7

State ex rel Butte Brewing Co., et al, vs.
District Court, 110 Mont. 250, 100 Pac. (2d) 932.. 8

Since the filing of appellant's brief, the appellee has filed with this court a supplemental transcript on appeal and her brief. In order to comment upon the materiality of the supplemental transcript and to argue certain issues raised by the appellee, which we consider to be new issues, this reply brief seems necessary.

(a) Supplemental Transcript on Appeal

In appellant's brief, pages 40 and 41, the court was advised that appellee, in the trial court, introduced no oral evidence to prove that the deaths of the Doheny girls occurred "by reason of and during the progress of the work" within the terms of the Contractor's Public Liability Policy and that for her proof on this issue, she relied entirely upon the pleadings, evidence, instructions and judgments in the state court actions which, in the main, constitute the supplemental transcript in the cases at bar.

The complaints in the state court actions alleged, and the answers admitted, that Coverdale & Johnson had a contract with the State of Montana for the construction of certain bridges and stock passes; that a drum hoist was rented for use by the contractor in the construction of the improvements; that under the rental agreement the hoist was to be delivered to its owner; that the trip to Great Falls by the partner Johnson and the employee Bardon, accompanied by the Doheny girls, was made for the purpose of showing the

trucker where to unload the equipment. However, none of those allegations establish that the contractor was "carrying on the work" when the accident occurred. Those allegations were material in the state court actions only to assist the appellee in establishing one of the essential elements of her cause of action, namely, that the parties were engaged in partnership business when the accident occurred. The fact must be recognized that Johnson and Bardon could well be engaged in partnership business and still not be "carrying on the work" as prescribed in the contract between Coverdale & Johnson and the State of Montana.

We cannot let go unchallenged appellee's statement (p. 12 of her brief) that the witness Bernhardt testified "that the hoist had been used on the work on the Sun River-Augusta highway and had finished using it that afternoon." The testimony of this witness affirmatively shows that in addition to the bridges and stock passes being built on the Augusta-Sun River road, the contractor was performing work on the Augusta-Choteau road and nowhere in his testimony nor in the entire record of the state court cases does it appear what work was being done or at what places by the contractor on the day the equipment was re-delivered to Great Falls.

The issue of whether the contractor was carrying on the work under the contract was not involved or requisite to a recovery by the appellee in the state court cases. The judgments in the state court cases are res adjudicata as to appellant only as to the issues involved

therein, which are enumerated on pages 40 and 41 of appellant's brief and since the issue of "carrying on the work" was not involved, the pleadings and evidence of the state court cases are immaterial in the cases at bar.

(b) Ambiguity.

There was no issue of ambiguity raised in the pleadings in the court below nor was there any finding relative thereto by the trial court. To the contrary the trial court recognized that the policy was a clear and unambiguous contract of insurance. It would now appear that appellee, having heretofore taken the position that the policy exclusions were inoperative, now views the policy as ambiguous. This view is based upon the misconception of the situs and type of improvements covered by the construction contract and described in the policy. The appellee assumes the situs "to include the entire road unit known as the Augusta-Sun River road" (pp. 14, 15, 16 and 17 of appellee's brief) and on this assumption proceeds to argue that there is an ambiguity in the policy.

The situs of the improvements contemplated by the contract is described many times in the contract documents and is also definitely fixed in the insurance policy. The notice to bidders (R. 88 and 89) prepared by the Montana State Highway Department definitely de-

scribed the situs and type of the improvements as follows:

> "The improvement contemplated consists of the construction of the following described structures on Section 'E' of the Augusta-Sun River Road in Lewis & Clark County:
>
> "1. A 2-span 79 ft. concrete bridge across the South Fork Sun River.
>
> "2. A single panel 19 ft. treated timber pile trestle.
>
> "3. Two standard treated timber stock passes.
>
> "4. A 5-panel 95 ft. treated timber pile trestle bridge across Spring Coulee.
>
> "5. A 4-panel 76 ft. treated timber pile trestle bridge across Dry Creek."

In the contract (R. 89 and 90) the situs and type of improvements are described as:

> "Construction or improvement of certain bridges in Lewis & Clark County, State of Montana, U. S. Public Works Highway Project No. NRH-176 'E', Unit 2."

Likewise the same description is contained in the contract performance bond (R. 100).

In endorsement No. 8 to the Contractor's Public Liability Policy (R. 161) the description is as follows:

> "NRH-176 'E', Unit No. 2, being concrete and timber pile bridges on Augusta-Sun River Road, Lewis and Clark County, Montana."

In other words all of the contract documents, as well as the policy itself, clearly and concisely limit the work and improvements to the construction of concrete and timber pile bridges in section 2 of the Augusta-Sun River Road in Lewis and Clark County, State of

Montana. The contract did not call for any road construction. There is nothing in any of the instruments to support appellee's statement that the situs of the work and improvements was "the entire road unit known as the Augusta-Sun River Road." Furthermore in all of the contract documents and in the Contractor's Public Liability Policy the work and improvements were described as being in the County of Lewis and Clark. No work or improvements were described as being within Cascade County, the county in which occurred the highway accident which forms the basis of the two cases at bar.

The exclusion of coverage for injuries or death caused by any automobile appears no less than in four different places in the policy in question. In each place the language used is clear and concise and there can be no doubt as to the meaning of the exclusions. Exclusion provisions in policies similar to those contained in the policy in these cases have generally been upheld by the courts. In *Leaksville Light & Power Co. vs. Georgia Casualty Co.,* 125 S. E. 123, the policy contained the following exclusion:

> "Except drivers and secretary and treasurer, and does not cover loss arising from injuries or death caused by any draught or any driving animal or any vehicle, or by any person while in charge thereof."

The insured there settled the claim of an employee who was injured by the negligent operation of one of

the insured's trucks. The court held that the defendant insurer was not liable under the policy inasmuch as the accident came within the above quoted exclusion. In part the court said:

> "It will be born in mind that this is a policy designed and intended to indemnify plaintiff against damages for injuries caused to third persons in the operation of the work in which the company is engaged, usually localized, and clearly is not intended to afford indemnity for injuries caused by operation of the company's vehicles in moving from place to place. So careful is defendant to stipulate against liability of the latter kind that it appears in the two places excepting drivers from the enumerated schedule, thus bringing them under the effect of subsection (1), and again excepting claims for injuries caused by any vehicle or by 'any person while in charge thereof.'
>
> "We are not inadvertent to the position urged upon our attention by appellant, that a policy, in case of ambiguity, should be construed more strongly against the company, but the principle does not extend to cases such as this, where a policy, explicit in terms and plain of meaning, withdraws a claim from its stipulations."

In *Commercial Standard Ins. Co. vs. McKinney,* 114 S. W. (2d) 338 (Texas), the court had under consideration a Contractors' Public Liability Policy which contained the following exclusion:

> "The Company shall not be liable for or on account of any claim alleging such injuries and|or death . . . . 2. Caused by the ownership, maintenance or use of a vehicle of any description or of any draft or driving animal; . . . . . . "

In that case the employees of McKinney were preparing to park a scarifier and tractor for the night when they were run into by a passenger bus, injuring seven persons traveling in the bus. The plaintiff settled the seven claims and brought suit against the insurer. The court held that the tractor involved came within the word "vehicle" in the exclusion above referred to and that there was therefore no coverage under the policy, saying:

> "This language is broad enough without resort to the statutory definitions to cover the tractor; 'a vehicle of any description' must certainly be construed to include a tractor.
>
> "Had section 2 of the exceptions to the coverage of the policy been a covenant of coverage, and not an exception to coverage, appellee would have had a clear cause of action against appellant for recoupment. If, as a covenant of coverage, section 2 would have made appellant liable, then as an exception to coverage, this section relieved it of liability."

In *Maryland Casualty Co. vs. Texas Fireproof Storage Co.,* 69 S. W. (2d) 826 (Texas), the following exclusion was under consideration:

> "This policy does not cover: . . . .
>
> "(6) any accident caused directly or indirectly by any automobile vehicle or by any draught or driving animal or vehicle owned or used by the assured or by any employee of the assured in charge thereof, unless such accident shall occur upon the premises specifically described in Item IV (a) of the Schedule hereof or on the public ways immediately adjacent thereto;"

The court found that the automobile accident in question occurred thirty-three city blocks from the premises described in the policy and further held that by reason of the policy exclusions above quoted, the insurer was not liable for the injuries resulting from the accident.

In *John Alt Furniture Co. vs. Maryland Casualty* Co., 88 Fed. (2d) 36 (1937), the exclusion under consideration was:

> "Any accident caused directly or indirectly by any automobile vehicle or by any draught or driving animal, or vehicle owned or used by the assured or by any employee of the assured in charge thereof, unless such accident shall occur upon the premises specifically described in Item IV (a) of the Schedule hereof (the premises occupied by the assured)."

The court held that the exclusion did not apply as the injury was not caused by any vehicle, but in this regard the court said:

> "The accident does not fall within the exceptions of the policy which are relied upon by the Maryland. It was caused by no vehicle or animal owned or used by either the assured or any of its employees. If it had been caused by the delivery truck, the loss would have been covered by the Mercury policy."

The Montana Supreme Court recently passed on a similar exclusion in the case of *State ex rel Butte Brewing Company, et al, vs. District Court,* 110 Mont. 250, 100 Pac. (2d) 932, which was a declaratory judgment action to have determined whether the Standard

Accident Insurance Company or the Occidental Indemnity Company, or either of them, was obligated to defend an action brought against the Butte Brewing Company for personal injuries by Richard McCulloh. In the Indemnity Company policy the following exclusion was contained:

> "That the company shall not be liable in respect of bodily injuries or death . . . . . 5. Caused by . . . . . . any motor or other vehicle owned or used by the Assured or by any person while engaged in the maintenance or use of same, including the loading or unloading thereof elsewhere than within or upon the premises owned by or under the control of the Assured, including the sidewalks or ways immediately adjacent thereto."

To use the language of the court in holding that the policy of the Indemnity Company did not cover the particular accident involved because of the specific exclusion contained in the policy:

> "Its policy, as above pointed out, covered liability for injuries off the premises if caused by business operations, but excluded injuries caused by any motor vehicle owned or used by the assured, including loading or unloading thereof. Having held that the injuries to McCulloh arose during the unloading process, the conclusion follows that under the express language of the policy of the Indemnity Company, it was exempt from liability. The court properly sustained the demurrer of the Indemnity Company."

It is now argued for the first time by appellee that the claimed uncertainty of the extent of the coverage was not known until the insurance policy was introduc-

ed in evidence at the trial in the lower court. This is asserted on the ground that appellee never had access to the policy or a copy thereof, although she had endeavored to obtain the same from the appellant and from the co-partners without success (p. 18 of Appellee's Brief). The appellee does admit, however, that the appellant furnished her with a copy of the daily report, which is the company's record of the policy and its provisions. In this respect it is pertinent to note that in the letter to counsel for appellee from the appellant, accompanying the copy of the daily report (R. 123), this statement is found: "The daily report should contain all the information set forth on the policy." Furthermore counsel for appellee admitted at the time of trial, and after examining the daily report and comparing the same with the original policy, that the daily report contained all of the policy provisions and exclusions (R. 130). The appellant furnished counsel for appellee with a copy of all of the information in its file with respect to the policy. There is no proof in the record that appellee ever sought by deposition, or by a motion to produce, at any time before the trial of the cases, to compel the production of the insurance policy for examination. It now seems idle for appellee to plead ignorance of the provisions of the policy when in fact her counsel had all of the policy information before these cases were instituted.

This same argument applies with reference to appel-

lee's excuse for not pleading a cause for reformation when the terms of the writing (insurance policy) were unknown. The evidence conclusively establishes that such was not the fact.

We again respectfully submit that the judgment of the trial court in the cases at bar should be reversed.

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